

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

TRAVIS J. WOODS v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Hamilton County
No. 251888 Barry A. Steelman, Judge**

No. E2007-02379-CCA-R3-PC - Filed March 18, 2009

The petitioner, Travis J. Woods, appeals the denial of post-conviction relief by the Criminal Court for Hamilton County from his convictions for attempted first degree murder, a Class A felony; aggravated assault, a Class C felony; and reckless endangerment, a Class E felony. He received consecutive sentences of thirty-five years for attempted first degree murder, six years for aggravated assault, and two years for reckless endangerment, for an effective sentence of forty-three years. He contends that (1) the trial court erred in finding he had the effective assistance of counsel at trial when trial counsel failed to (a) obtain a mental evaluation of the petitioner, (b) discover the weapon used in the shooting and to obtain ballistics testing of it, (c) object to the prosecution's statements regarding the petitioner's prior bad acts or "alleged drug involvement," and (d) impeach the victim with his drug conviction and "drug history;" (2) the trial court erred in finding that appellate counsel's failure to inform the petitioner of his appeal did not fall below the range of competence demanded of criminal defense counsel; and (3) the trial court erred in not holding that his sentences were invalidly enhanced in violation of his right to trial by jury pursuant to Blakely v. Washington, 542 U.S. 296 (2004). We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Jason D. Demastus, Chattanooga, Tennessee, for the appellant, Travis J. Woods.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Senior Counsel; William H. Cox, III, District Attorney General; Jason L. Thomas, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In its opinion affirming the petitioner's convictions and sentences, this court found the following facts:

On December 4, 1998, Kevin Cameron, his girlfriend and two children were living at 1802 Olive Street in Chattanooga. The [petitioner] and two individuals identified as Eric Jones and Terry Jackson often stood on the street in front of Cameron's house. Woods, Jones and Jackson were apparent street dealers in illegal drugs. Cameron had repeatedly requested that the trio take their business elsewhere because of the adverse impact drug dealing was having on children in the neighborhood. As a result of these requests relations between Cameron and the [petitioner] and his compatriots were very strained.

On December 4, Cameron once again had an altercation with Jackson and Jones who left the neighborhood only to return a short time later with guns. The [petitioner], who was observing the return of his now armed companions, approached Jackson and Jones, and an argument ensued as to whether it was prudent to shoot Cameron in front of his own home.

As Cameron began walking toward his home the [petitioner] ran behind him and started shooting at Cameron, who was now running for his life. As he ran toward his residence Cameron saw his pregnant girlfriend, Rhonda Walker, was on the porch. Cameron dove on top of her to protect her from the gunfire while the [petitioner] continued shooting at him. Bullets were flying everywhere, and one struck the porch of Cameron's neighbor, Dennis¹ Hampton, who was standing on [her] porch. Cameron was wounded in the back and leg by the gunfire. The bullet was left in Cameron's back because of the dangers of removing it, and he had a three-to-four-inch scar from the bullet wound to his leg.

State v. Travis Jay Woods, No. E2001-01027-CCA-R3-CD, Hamilton County, slip op. at 1-2 (Tenn. Crim. App. July 16, 2003), app. denied (Tenn. Dec. 8, 2003). A jury in Hamilton County convicted him of attempted first degree murder, aggravated assault, and reckless endangerment. The trial court imposed an effective sentence of forty-three years.

At the post-conviction hearing, appellate counsel testified that he was appointed to the petitioner's case after sentencing for the motion for new trial and appeal. He stated that he appealed the case to this court, which affirmed the petitioner's convictions in July 2003. He said that he sent a copy of this decision to the petitioner, whom he said instructed him to pursue an appeal to the Tennessee Supreme Court. He said that after that court denied permission to appeal in December 2003, he sent the petitioner his file and told him to file a petition for post-conviction relief raising

¹ Trial counsel testified at the post-conviction hearing that he remembered the name "Mrs. Denise Hampton" because "her first name looks like Denise but it was [pronounced as] Dennis."

a sentencing claim pursuant to Blakely v. United States, 542 U.S. 296 (2004). He said he later sent the petitioner an August 12, 2004 letter after he had suffered a data loss in his office. He said that this letter informed the petitioner that he had not pursued an appeal to the Tennessee Supreme Court, although the order denying the petitioner's pro se petition for rehearing states that the application for permission to appeal was indeed filed by counsel and denied. Appellate counsel said he had not had any difficulties communicating with the petitioner.

On cross-examination, appellate counsel testified he had been a practicing attorney for twenty-seven years when he was appointed to the petitioner's case in 2001. He stated that the petitioner had had three or four attorneys before he received the case. He said that he obtained permission from the trial court to amend the (filed) motion for new trial and that he reviewed the entire transcript to prepare his motion for new trial. He said that he argued seven to eight issues in his motion for new trial brief, although he stated he argued five at the hearing on the motion. He recalled several issues, including the admissibility of the pistol, a motion in limine regarding drug activity, and sentencing evidence about the petitioner's prior criminal record. He stated the petitioner did not testify at trial. He said that the petitioner's appeal used the same issues as in the motion for new trial but that the motion and appeal predated the United States Supreme Court decisions in Blakely v. United States, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005).

Appellate counsel testified on cross-examination that it had been difficult to convince the petitioner that the appeal could only proceed on the trial record, and he said the petitioner wanted appellate counsel to raise ineffective assistance claims for each of his former attorneys, although the record did not contain evidence of the petitioner's allegations. He said that the petitioner was transferred to the Department of Correction and that it was appellate counsel's normal practice to correspond with clients by letter if they did not telephone him. He admitted that his August 12, 2004 letter was incorrect. He further explained that when his computer crashed, he lost all copies of his correspondence with the petitioner. He said he later found a back-up file of his fee motion and his briefs, all of which he gave to the Board of Professional Responsibility after the petitioner filed a complaint against him. He stated that he had told the petitioner in his December 2003 letter that the petitioner had one year in which to file a petition for post-conviction relief. He acknowledged that the petitioner had written him in the summer of 2004 to inquire how to pursue his post-conviction claim and that this letter was the impetus for the August 12, 2004 letter to the petitioner. He repeated, however, that his August 12 letter was not the first time he told the petitioner about filing a post-conviction petition. He said he learned the petitioner filed a timely post-conviction petition between the date of the letter and December 8, 2004, the date when the statute of limitations for filing a post-conviction relief petition ran. He said he did not assist the petitioner in filing a petition to rehear with the Tennessee Supreme Court.

Trial counsel testified that he had practiced two to two and one-half years at the time of the petitioner's trial. He said he and the petitioner discussed "numerous times" the facts of the case. He said the petitioner gave him the names of the following people to investigate: Eric Jones, Terry Jackson, the victim (Kevin Cameron), Robert King, Denise Hampton, and one to two other names trial counsel could not recall. Trial counsel said the petitioner told him these people would have information helpful to the petitioner's case. Trial counsel stated that he interviewed Terry Jackson

and Robert King. He said that he tried to speak with Eric Jones but that he had counsel at that point for a drug-related charge. He said he spoke to the shooting victim, who was not cooperative. He said that he knocked on doors in the neighborhood and spoke to other people who observed the shooting. He said that some of the witnesses did not want to speak with him or co-counsel due to their prior records. He said that he and co-counsel investigated the bulk of the case together, although he said he interviewed Terry Jackson alone. He said he considered the potential testimony of all these witnesses to be consistent and unfavorable to the petitioner's case. He stated that the witnesses told him the area was a known drug area and that his own visit to the neighborhood corroborated this. He said he and co-counsel filed a motion to exclude evidence about drug activities in the neighborhood, including the victim's testimony that he wanted to stop the petitioner from selling drugs there. He said the trial court granted the motion pre-trial, but he acknowledged the court may have made a preliminary determination that could be revisited during trial. He said that he and co-counsel objected in court to the prosecutor's request to admit evidence regarding drug activity and that after the bench conference, the trial court overruled its earlier decision to exclude the testimony. He said he made a continuing objection to this evidence in the bench conference.

Trial counsel testified he did not represent the petitioner during the preliminary hearing, but he said he obtained and listened to the tapes of the preliminary hearing. He stated he photocopied documents from the court clerk's file and that he filed "numerous" discovery motions. He said the petitioner's arrest warrant was signed only by a deputy clerk. He said he would usually object to an unsigned arrest warrant if the general sessions court had found probable cause and the client had not yet been indicted.

Trial counsel testified that he did not object during the State's opening statement to the prosecutor's claim that the victim had been shot in the back instead of his buttocks because, in his opinion, it was not a meaningful difference. He said he usually allowed the State to "dig a hole as deep as [it] wants to dig it" during the opening statement to allow the defense to capitalize on any unproven claims in its own case. He stated he would not object during the opening statement unless a claim was egregiously inaccurate. He said that co-counsel's opening statement asked the jury to consider the evidence presented during the case rather than specifically rebutting the State's claims.

Trial counsel testified that the victim had at least one prior marijuana possession conviction. He said that although he did not introduce evidence of this conviction, the jury knew the victim's blood tested positive for marijuana and alcohol because it had been revealed through direct or cross-examination when the victim admitted the blood content.

Trial counsel testified that he and co-counsel filed a motion to dismiss the later indictment filed by the State, which trial counsel claimed was based on information the State had at the time the first indictments were filed. Trial counsel said the court denied the motion, and he did not remember whether he and co-counsel renewed the objection subsequently.

Trial counsel testified that he and co-counsel did not present any expert testimony at trial. He said he and co-counsel moved the court to have the weapon found at the scene of the shooting examined but the court denied the motion. He stated that he did not present evidence at trial that the petitioner had any addictions because, in his view, it would have been irrelevant to the petitioner's

claim that he was not the shooter. He said he and the petitioner discussed whether to pursue any claim of addiction.

Trial counsel testified that he did not call Eric Jones or Terry Jackson as trial witnesses. He said that Terry Jackson had stated that the petitioner was the shooter and that if the victim had “stayed still,” he would have been killed by the petitioner. He said that before Eric Jones obtained counsel, he had made a pretrial statement that the petitioner was the shooter. He said that in view of these statements identifying the petitioner as the shooter, he did not call either of these men as witnesses, although he admitted that both men had extensive criminal histories.

Trial counsel testified that he filed discovery motions and that the State did not disclose a statement of Eric Jones that the petitioner was the shooter until trial or shortly beforehand. He stated that he sent his file, including all witness statements, to the petitioner after the supreme court denied permission to appeal and he withdrew from the case. He testified that he did not move for a mistrial based on the admission of drug activities because his experience in the trial court showed that the court would not have granted the motion.

On cross-examination, trial counsel testified that after he was appointed, he was able to get the trial date postponed to allow him sufficient time to investigate and prepare the petitioner’s case. His summary of the case corresponded to this court’s findings of fact on direct appeal. He said that although the petitioner insisted Eric Jones was the shooter, his investigation did not find anyone that would corroborate this claim. He said that if anyone existed who could corroborate the petitioner’s assertion of innocence, he would have put that person on the stand. He said that Terry Jackson emphatically asserted that the petitioner was the shooter. Trial counsel stated that the petitioner was on bond but that it had been revoked after an allegation of intimidation.

Trial counsel testified about conflicting theories of the case he and the petitioner had. Trial counsel said he wanted to argue for a lesser included offense of reckless endangerment because the petitioner chose not to follow the victim, lying on the ground, to kill him at close range. He said that the petitioner, however, wanted to defend by saying he was not the shooter and so testifying. Trial counsel stated that he could not use the lesser included offense theory when the petitioner wanted to testify that he was not the shooter. In view of the petitioner’s preferred theory, trial counsel argued identity at the trial.

Trial counsel testified that he never had reason to think the petitioner was under the influence at any time while he was on bond or in jail. He said he and the petitioner discussed the petitioner’s drug use during trial preparation. He said he obtained the petitioner’s medical records, which showed the petitioner went to the hospital with symptoms of a heart attack four to five days before the shooting. He did not remember any proof at the trial showing cocaine in the petitioner’s system, and he stated that crack cocaine stays in a human body for up to forty-eight hours. He said he and the petitioner discussed the above and concluded that any drug use was irrelevant to the petitioner’s claim that he was not the shooter. He said he and the petitioner discussed how the petitioner would face credibility problems if he testified because (1) he was the only witness testifying that he was not the shooter, (2) he would say he was on drugs at the time of the shooting, and (3) he had a prior record that would be used for impeachment.

Trial counsel testified that he never found a factual basis for a competency evaluation during his approximately twenty to thirty meetings with the petitioner. He said that he and co-counsel worked together on the petitioner's case although having two attorneys was not a necessity. He said he filed a motion for new trial. He said he and co-counsel withdrew and filed a fee request after the petitioner had filed complaints against them with the Board of Professional Responsibility. He said that the State did not have any agreements with witnesses and that none were disclosed. He said that by the time of the preliminary hearing, any charges against Eric Jones and Terry Jackson had been dropped. He stated that both he and co-counsel knew where the victim had been shot, and he said it was their tactical decision not to object to the prosecutor's statement that the victim had been shot in the back. He said it was a tactical decision not to argue conflicting strategies of identity and lesser included offenses because the jury would have found him not to be credible if the defense argued both theories. He said this decision honored the petitioner's claim that he was not the shooter, but he said that they had no evidence supporting the petitioner's claim. He said he and co-counsel argued at the sentencing for mitigating factors but conceded the petitioner was a Range II offender. He said the trial court found applicable enhancement factors in view of the petitioner's sentence above the minimum for the range.

Co-counsel testified that he became involved in the petitioner's case approximately six to eight months before the petitioner's trial. He said he spoke with the petitioner, who gave them names of people to question. He stated that he and trial counsel looked for all of these people but that they could not find all of them. He said that all the people they questioned about the shooting said the petitioner held a gun the night of the shooting. Although he could not recall the exact wound sites, he remembered the victim had been shot from behind. He said the trial court overruled his and trial counsel's efforts to exclude evidence that the area was known for drug dealing and that the petitioner was a drug dealer. He said the trial court was "well aware" of the defense's objections to the testimony. He said that the defense had filed a motion to exclude this testimony and that there was a bench conference on the motion.

On cross-examination, co-counsel testified that the investigation of the case yielded no defense strategies other than requiring the State to prove all elements of the charged crimes. He said he and trial counsel discussed this strategy with the petitioner. He said that he and trial counsel could not pursue a lesser included defense strategy because the petitioner kept insisting he was not the shooter. He did not recall any settlement offers.

On re-direct examination, co-counsel testified that the trial court order appointing him to the case was dated February 1, 2000. He testified that the petitioner's trial occurred in March 2000, although he recalled it taking place in August 2000. He stated that trial counsel had already invested substantial time in the case and that he was co-counsel. He said that investigation after he joined the defense team did not yield anything favorable to the petitioner's case, that he was "thoroughly familiar with the case" by the time of trial, and that he felt prepared to give the opening statement.

The petitioner testified at the post-conviction hearing that because appellate counsel sent him three conflicting letters, he did not know whether permission to appeal had been filed and whether it had been adjudicated. He claimed he did not know what was going on in his own case. He stated

that he obtained the court records for this case by filing a motion to reconsider in the supreme court. He said he did not, at the time of this hearing, know “what was said in the appeal” or who filed an appeal to the supreme court. He said he did not receive anything after his attorney told him during a telephone conversation that he would “do everything possible” for the appeal. He claimed to have sent appellate counsel several letters requesting status updates but said he did not receive a response from appellate counsel until September 7, 2004, the date on which he received appellate counsel’s letter dated August 12, 2004.

The petitioner testified that his trial attorneys did not call Eric Jones or Terry Jackson to testify. He said he asked his trial attorneys to present the testimony of two children who lived in a house where the petitioner allegedly hid the weapon. He stated trial counsel told him that he did not want to subject the children to testifying. He said no defense witnesses were presented at trial. He claimed that the State asserted the shooter used a “small revolver” but that he wanted ballistics testing to show how such a weapon could produce the wounds suffered by the shooting victim. He said his trial attorneys “refused” to obtain the ballistics testing he requested on that weapon and on another weapon, a .38 caliber pistol. He said trial counsel told him he would raise the issue of his heart attack. He said he asked his trial attorneys to have him psychologically evaluated but that one of them was wary of doing so.

The petitioner testified that although the trial court granted his attorneys’ motion to exclude evidence of drug activity in the area and his own prior record, they did not object to the State’s later presentation of this evidence. He claimed he asked his attorneys to object to this evidence and said they did not. He said he and trial counsel had an agreement that trial counsel would “bring . . . up” the State’s claim that the victim was shot in the back. According to the petitioner, the State’s argument “poisoned” the jury, and he said that his attorneys were supposed to rebut what the State said but failed to do so in their opening statement. The petitioner explained his “poisoning” argument by saying that if the jurors had known that he shot the victim in the buttock instead of in the back, they would have found that he lacked the intent to kill the victim and would not have convicted the petitioner of attempted first degree murder. He said that if he had known the content of the defense’s opening statement, he would have asked the trial court to remove co-counsel from the case. The petitioner claimed he did not understand why he had two trial attorneys. He claimed they were supposed to get the subsequent indictment dismissed instead of “quashed” because the victim had not been injured. The petitioner asserted that the trial court found enhancement factors in violation of Blakely and that his bond had been revoked due to the subsequent aggravated assault charge.

The petitioner testified that due to appellate counsel’s failure to inform him of the post-conviction statutes, he was pressed for time to file his post-conviction petition. He said the confusion of appellate counsel’s correspondence led him to doubt whether appellate counsel used his best efforts to pursue the petitioner’s case on direct review.

On cross-examination, the petitioner testified that while he had heard trial counsel’s testimony that they tried to have the indictment dismissed, he stated they filed the wrong motion. He admitted, however, that the judge denied the motion. He stated that the victim testified at trial that he had been shot in the buttocks, although he claimed the jury did not hear this testimony. He

admitted the jury heard the testimony of a physician that the victim had been shot in the “right flank.”

The petitioner admitted he was able to file a petition to rehear, although he denied that the very title of the pleading alerted him that the supreme court had already reviewed the matter and denied relief. He insisted he relied on appellate counsel’s August 12, 2004 letter, in spite of appellate counsel’s testimony that he sent the petitioner a letter and his case file after the Tennessee Supreme Court denied permission to appeal. He admitted that one application for permission to appeal had been denied and that his own pro se petition for rehearing had been denied. He admitted filing a petition for post-conviction relief and acknowledged that counsel had been appointed for him. He stated that counsel had amended his original petition for post-conviction relief. He stated that in view of several years between his 2004 filing and the 2007 hearing, he still felt rushed in presenting his post-conviction claims for relief. He admitted that the State offered him a plea of eighteen to thirty-six years, with all sentences concurrent, and that he rejected the plea offer, saying he was not the shooter. He disputed the testimony of the trial witnesses that he was the shooter, saying that no one saw him shoot the victim. He denied that he had been back to the neighborhood of the shooting and said the trial court revoked his bond after the court stated it could not identify him in the picture provided by the complaining witness. He admitted having seven to eight attorneys at the trial level and said he filed ethics complaints against three of them. He admitted he “probably was” a Range II offender at trial but stated the charges underlying this post-conviction proceeding were the only ones he took to trial. He repeated that his attorneys did not keep objecting to evidence of his prior bad acts but instead only objected once. He said the transcript did not show any record of their objections after this initial objection.

Co-counsel was called as a rebuttal witness. He testified that at the petitioner’s request, he and trial counsel interviewed the children one day when their parents brought them to court. He said that he and trial counsel spoke with the children in the hallway outside the courtroom and that they did not say anything that would have helped the defense. He said he and trial counsel decided their testimony would not be useful and would perhaps hurt the defense’s case. He said the petitioner was not privy to the bench conferences, at which he and trial counsel objected to admission of testimony that the area was a known drug area because they did not want the petitioner to be associated with that.

On cross-examination, co-counsel testified he and trial counsel wanted to keep out all evidence of the area being known for drug sales and evidence that the victim was confronting the petitioner because of his drug activity. Co-counsel stated the trial court overruled its order excluding this evidence. Regarding the children’s potential testimony, he said that the defense had sought to speak with them but that they were only available on the day of trial. He did not recall whether the children said they had seen the petitioner with a gun.

The trial court dismissed the petition for post-conviction relief. In its memorandum, the trial court found first that the petitioner did not demonstrate by clear and convincing evidence that he received the ineffective assistance of counsel on appeal. The court stated that although appellate counsel had been mistaken in claiming he had not filed the petitioner’s permission to appeal to the Tennessee Supreme Court, the petitioner had not been prejudiced because (a) appellate counsel had

indeed filed permission to appeal, which our supreme court denied, and (b) the petitioner not only was able to file a petition for rehearing with our supreme court, but he was able to file a timely petition for post-conviction relief.

Second, the trial court found that the petitioner did not demonstrate he received the ineffective assistance of counsel at trial. The trial court stated that the petitioner had not demonstrated prejudice from any claimed deficient performance of his attorneys. The trial court found that when his attorneys interviewed or tried to locate and interview all eyewitnesses, including Terry Jackson and Eric Jones, the witnesses said either that they did not see the shooting or that the petitioner was the shooter. The trial court also noted that the petitioner did not present the testimony of any witness he claimed his attorneys failed to interview. The trial court found that the petitioner did not support his claim that his attorneys failed to discover any statement Eric Jones had provided the State in return for more lenient treatment in another case. The trial court found that because the State did not recover the weapon used in the shooting but instead only a .38-caliber gun, any ballistics analysis of the .38 caliber would have been irrelevant to the charges. The trial court found that there was no evidence supporting the petitioner's claim that the prosecutor's description of the weapon as being smaller than a .38 was inaccurate. The trial court found that the petitioner's attorneys' alleged failure to impeach the victim with his prior conviction for marijuana possession was not prejudicial because his attorneys cross-examined him about his drug use. The trial court found that the petitioner's claim that his attorneys failed to impeach prosecution witnesses with prior inconsistent statements was meritless in view of the petitioner's failure to present any evidence for this claim. The trial court found that trial counsel testified that he never had any reason to question the petitioner's competency; any drug testing of the petitioner performed after his arrest date, four months after the shooting, would have been irrelevant to any claimed impairment of the petitioner on the date of the offense; and because the petitioner insisted that he was not the shooter, his claim of impairment due to a mental condition or substance abuse was irrelevant to the defense strategy of identity. The trial court found that his attorneys objected to the introduction of testimony that the petitioner was a drug dealer but that the trial court later admitted the testimony as 404(b) evidence of the victim's objections to drug dealing at the time of the offenses.

Third, the trial court found that the petitioner waived any claim by not contemporaneously objecting that the prosecutor prejudicially misstated the location of the bullet wound, and that even if the claim had not been waived, the statement was still "fair" or even "exploitable" for his attorneys. And, fourth, the trial court found that Blakely v. United States, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), did not apply "retrospectively." The trial court concluded in a footnote that because Blakely had been decided after the petitioner's direct appeal had been concluded, counsel's performance on appeal had not been deficient by not pursuing a Blakely claim.

I. NOTICE OF APPEAL

The State contends that the notice of appeal was untimely and that the "interest of justice" does not require a waiver of this filing. See T.R.A.P. 4(a). It argues that because the petitioner has not demonstrated why the interest of justice requires waiver of a notice of appeal, this court should dismiss the appeal. See State v. John A. Turbyville, No. E2002-00629-CCA-R3-CD, Sullivan

County, slip op. at 2 (Tenn. Crim. App. Aug. 21, 2003). The petitioner neither discussed timeliness in his brief nor filed a reply brief to rebut the State's argument.

The record reflects that the trial court's order denying post-conviction relief was filed July 30, 2007, and that the file stamp on the petitioner's notice of appeal is October 18, 2007. In his notice of appeal, however, the petitioner's counsel stated that he was not served with the order denying post-conviction relief until October 10, 2007. He contended that due process and equal protection concerns required the tolling of the thirty-day period when a judgment becomes "final." We note the notice of appeal is not jurisdictional in criminal cases. T.R.A.P. 4(a). Unlike the defendant in Turbyville, the petitioner before us has raised numerous substantive allegations in his petition for post-conviction relief. We conclude that the "interest of justice" requires the waiving of the petitioner's notice of appeal pursuant to Rule 4(a) of the Tennessee Rules of Appellate Procedure, and we will decide the appeal on its merits.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006).

II. INEFFECTIVE ASSISTANCE OF COUNSEL (ISSUES 1 AND 2)

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04

(D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see DeCoster, 487 F.2d at 1201.

A. Ineffective Assistance of Counsel at Trial

The petitioner argues the failure of his trial attorneys to obtain a mental evaluation, including both competence and addiction, of the petitioner falls below the "accepted competence of a defense attorney." The State responds that the trial court properly denied relief in view of the petitioner's failure to demonstrate deficiency and prejudice to his case.

We hold the evidence does not preponderate against the findings of fact of the trial court. Trial counsel testified that during his many meetings with the petitioner, he never had any reason to doubt the petitioner's competency. Trial counsel testified that the petitioner always insisted that he was not the shooter, such that any claim of diminished competence or addiction would have been irrelevant to the petitioner's case strategy. Trial counsel testified that he and the petitioner discussed the petitioner's drug use. Trial counsel and co-counsel testified that they honored the defense strategy the petitioner wanted, even if it meant they could present no evidence to rebut the State's case, something the petitioner said irked him at the proceeding.

The decision not to rely on diminished competence or addiction was a tactical decision. Thus, the fact that the petitioner's own defense strategy did not exonerate him is insufficient to demonstrate prejudice to his case. See Cooper v. State, 847 S.W.2d at 528. Additionally, the petitioner has not demonstrated deficiency. He has not presented clear and convincing evidence to the trial court of any competence or addiction evaluation as required by Code section 40-30-110(f), much less one showing that he was impaired at the time of the shooting. Although the petitioner included his medical records from his emergency room visit in the record, he does not indicate which of these materials would be relevant to a competence or addiction evaluation. "When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). This applies to investigation of facts as well as investigation of witnesses. See id. at 757-58. This court cannot "speculate or guess" what investigation of the petitioner's claimed psychological and dependence situation would reveal. Id. at 757. The trial court's conclusion that the petitioner had not demonstrated the ineffective assistance of counsel was not erroneous. The petitioner is not entitled to relief.

The petitioner claims his attorneys' performance was deficient in not discovering the weapon used in the shooting and subjecting it to ballistics testing. He states that trial witnesses testified that a "revolver" was the weapon in the shooting and that the State was aware of a second gun found in the area that could have been the shooting weapon. He asserts that if his attorneys had obtained this

weapon, the petitioner would have been able to argue that although witnesses testified that he was at the scene of the shooting and had a handgun, the gun used in these crimes was not his. The State replies that the trial court properly denied relief in view of the petitioner's failure to demonstrate deficiency and prejudice to his case, evidenced by his attorneys' motions requesting testing and appointment of a ballistics expert, which the trial court denied.

The trial court found that the .38 caliber weapon recovered near the crime scene was too large to be the weapon used in the shooting, that the State did not recover the actual weapon used in the shooting, and that the weapon recovered near the crime scene was not relevant to the petitioner's case. The petitioner's trial attorneys requested the trial court order the State to perform ballistics testing on the gun that the petitioner alleged the State claimed to have. At a hearing, the State responded that it had no weapon, that no shells were recovered at the crime scene, and that the witnesses to the shooting said the shooter used a revolver. The State said a gun found near the crime scene, a semi-automatic pistol, was not the weapon used in the underlying charges. The trial court denied the motion requesting a ballistics report. Appellate counsel pursued the ballistics argument on direct appeal and argued that the trial court erroneously denied the petitioner's motion for ballistics testing. State v. Travis Jay Woods, slip op. at 5. Reviewing the evidence, this court found no credible support for the petitioner's claim that the trial court was required to order ballistics testing and to appoint an expert for a weapon that was not used in the commission of the offense. Id. at 6.

The petitioner has failed to demonstrate prejudice to his case in view of the trial evidence, summarized in this court's opinion, that witnesses saw or heard the petitioner chase the victim and say he was going to shoot the victim. Id. at 3. He has not shown a reasonable probability that the result of the proceeding would have been different had he been able to obtain and test a weapon that was not used in the shooting. The petitioner is not entitled to relief.

The petitioner claims that his attorneys were ineffective by not objecting to the prosecutor's characterization of the wound site during opening statement and to the State's introduction of testimony that the petitioner was present during or participated in drug sales in front of the victim's home. We note that the petitioner presents this wound characterization issue under the argument section for trial attorneys' alleged failure to object to "the Prosecution's Statements Regarding the [petitioner's] Prior Bad Acts or Alleged Drug Involvement." The petitioner claims that introduction of this character evidence caused the jury to conclude that the petitioner was involved in drug crimes and that he should be convicted for the charged offenses "simply due to his alleged presence at the scene of the crime." The State argues that the trial court properly found the petitioner had not demonstrated both deficiency and prejudice. The State claims (1) not objecting to the characterization during opening statement was a tactical decision and insufficient to demonstrate deficiency and prejudice, and (2) the trial attorneys were not deficient because they moved to exclude any reference to drug activity in the area in which the shooting occurred and to the petitioner's drug activities.

The petitioner has not shown that the evidence preponderates against the trial court's findings that the petitioner waived this claim by not objecting contemporaneously and that the statement was a fair description of the wound site. The trial court found that even if the statement were inaccurate,

the petitioner's attorneys were able to exploit any inconsistency. The trial court noted the jury heard the victim's general surgeon testify that the victim's gunshot wounds were in the "right flank/buttock" area.

The petitioner has not demonstrated deficient performance of his attorneys. Trial counsel testified that it was a tactical decision not to object during opening statement. The petitioner, however, claims that this testimony "poisoned" the jury. He has produced no evidence supporting this speculative claim. See Black v. State, 794 S.W.2d at 757. Because the petitioner failed to prove deficient performance and prejudice, the trial court did not err in holding that he was not entitled to relief.

The petitioner has also not shown the evidence preponderates against the trial court's findings that any deficient performance in the admission of his drug activities was not prejudicial. The trial court admitted the testimony regarding his drug involvement as relevant motive evidence after satisfying the requirements of Tennessee Rule of Evidence 404(b). Both attorneys testified that they objected to the admissibility of testimony regarding the neighborhood's reputation and the petitioner's drug activities. They stated that although the trial court initially excluded such testimony, the court later reversed itself to allow this testimony, particularly the testimony of police officers that the victim had objected in the past to the petitioner's and others' drug sales in front of his home, as admissible character evidence showing motive pursuant to Rule 404(b) of the Tennessee Rules of Evidence. The petitioner has not shown a reasonable probability that but for the admission of this relevant testimony, the result of the proceeding would have been different. He is not entitled to relief.

The petitioner contends that his attorneys were ineffective by failing to impeach the victim with evidence of a prior marijuana possession conviction. The petitioner asserts that if his attorneys had impeached the victim with this conviction, additional evidence that the victim was a drug user and indeed a drug seller would have come to the fore, such that "the victim was . . . the type of individual he was allegedly trying to confront." The State replies that the trial court properly found that even if his attorneys had been deficient in not impeaching the victim with the conviction, the petitioner has not demonstrated prejudice.

We conclude that the record does not preponderate against the trial court's factual findings that the jury was aware of the victim's marijuana use. Trial counsel testified the victim admitted that his blood tests showed he had marijuana in his system. We note that the victim testified at trial that he drank a Courvoisier the night of the shooting and that he smoked marijuana during the holidays but not the day of the shooting. The general surgeon testified that the victim had 84 milligrams of alcohol per deciliter in his system when he came to the emergency room but that he could not tell how many drinks the victim would have consumed to have a blood alcohol content of 0.08, the level of intoxication pursuant to the driving under the influence statute. The surgeon also testified that the victim had marijuana in his system at a level consistent with having smoked marijuana at some point within the last thirty days. The surgeon also acknowledged that the victim admitted in his hospital records that he smoked marijuana twice weekly. Trial counsel stated that he did not introduce evidence of the victim's conviction because he could not find a way to admit it under the rules of evidence and that he did not introduce the victim's medical records showing his blood

content because he admitted he had smoked marijuana and consumed alcohol before the shooting. Rather than impeaching the victim further with his drug conviction, trial counsel set up the inconsistency in the victim's testimony that while the victim tried to prevent drug sales from occurring outside his home, he in fact used drugs inside his home. The record does not include the judgment for the victim's conviction of possession of marijuana. We note that Tennessee law does not consider drug crimes to be crimes of dishonesty or false statement. State v. Waller, 118 S.W.3d 368, 372 (Tenn. 2003). Therefore, to be admissible under Tennessee Rule of Evidence 609, the victim's drug conviction in the present case must be a felony. The victim's conviction was for a misdemeanor. T.C.A. § 39-17-418(c). We are unable to conclude that the victim's conviction was admissible at trial or that trial counsel's performance was deficient.

We also agree with the trial court's determination that the petitioner had not demonstrated prejudice. The trial court determined that any alleged deficiency was not prejudicial, in view of his attorneys' cross-examination of the victim and examination of the emergency-room physician. In other words, the trial court found that the victim's drug use had been presented to the jury, thereby precluding the showing of prejudice the petitioner now asks us to find. The petitioner has not demonstrated by clear and convincing evidence that "the result of the proceeding would have been different" through impeachment of the victim by a prior possession conviction. The petitioner is not entitled to relief.

B. Ineffective Assistance of Counsel on Appeal

The petitioner contends that his appellate attorney's failure to inform him of the status of his appeal fell below the standard of competence for criminal defense attorneys. The State responds that in view of the trial court's conclusion that the petitioner has not proven prejudice as well as deficiency, the petitioner is not entitled to relief.

We agree with the State. The record does not preponderate against the trial court's findings that the mistaken statements in appellate counsel's correspondence with the petitioner were "inconsequential." Appellate counsel pursued direct review to this court and the Tennessee Supreme Court. At each level, the petitioner's convictions were affirmed. The record reflects that appellate counsel corresponded with the petitioner in a series of letters and that during this period of correspondence, appellate counsel suffered a data loss at his office. Although he erroneously told the petitioner that no application for permission to appeal had been filed, appellate counsel in fact pursued this next level of relief, which our supreme court denied on December 8, 2003. Appellate counsel testified that he had told the petitioner in December 2003, after the exhaustion of the petitioner's direct appeals, that he should file a petition for post-conviction relief raising a Blakely issue as a ground for relief and that the petitioner only had one year in which to file this petition. The record shows that the petitioner, pro se, filed two timely petitions for post-conviction relief. He filed one of these even after he had been appointed counsel, who later filed a timely, amended petition for post-conviction relief. In addition to pursuing post-conviction relief, the petitioner also filed a pro se petition for rehearing at our supreme court.

The petitioner has not demonstrated a reasonable probability that but for appellate counsel's misstatements, the result of his direct appeal would have been different. The petitioner's case was

affirmed on direct review, and he filed timely petitions for post-conviction relief, which the trial court dismissed after appointing counsel, permitting the amendment of the initial two-letter petition, and holding a hearing at which the petitioner, trial attorneys, and appellate counsel testified. We conclude that the petitioner has not shown he received the ineffective assistance of appellate counsel and that he is not entitled to relief.

III. BLAKELY CLAIM

The petitioner contends the trial court erred in not concluding that his sentences were invalidly enhanced in violation of his right to trial by jury pursuant to Blakely v. Washington, 542 U.S. 296 (2004). There, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Blakely, 542 U.S. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). He states that while Tennessee courts normally do not apply Blakely retroactively for post-conviction cases, he asserts that the rule announced in Blakely is a “factual extension” of the rule announced in Apprendi, such that it was erroneous not to apply Apprendi to the petitioner’s sentences on direct review. Alternatively, he claims that the petitioner’s case satisfies the test announced in Teague v. Lane, 489 U.S. 288 (1989), for retroactive application of federal law. The State responds that Blakely and its progeny do not create a new law requiring retroactive application to cases on collateral review, and therefore, that the petitioner is not entitled to Blakely relief in post-conviction proceedings.

The trial court found that Blakely and United States v. Booker, 543 U.S. 220 (2005), did not apply “retrospectively.” It stated additionally that because Blakely had been decided after the petitioner’s direct appeal had been concluded, counsel’s alleged failure to pursue a Blakely claim on direct appeal was not deficient performance.

We acknowledge that this court has held that Blakely does not apply retroactively on collateral review. Mitchell Waldroop v. State, No. E2006-02368-CCA-R3-PC, Campbell County, slip op. at 10 (Tenn. Crim. App. Oct. 2, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, Davidson County, slip op. (Tenn. Crim. App. Nov. 13, 2007), app. denied (Tenn. Apr. 7, 2008); Carl Johnson v. State, No. W2003-02760-CCA-R3-PC, Shelby County, slip op. at 4 (Tenn. Crim. App. Jan. 25, 2005), app. denied (Tenn. June 27, 2005); Donald Branch v. State, No. W2003-03042-CCA-R3-PC, Shelby County, slip op. at 9-10 (Tenn. Crim. App. Dec. 21, 2004), app. denied (Tenn. May 23, 2005). Therefore, the petitioner has not alleged a cognizable basis for post-conviction relief, and he is not entitled to relief on this issue.

We conclude that the evidence does not preponderate against the trial court’s findings and that the petitioner is not entitled to relief as a matter of law. Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

JOSEPH M. TIPTON, PRESIDING JUDGE